No. 91-6646

12/9/91

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1991

VERL HADLEY

Petitioner,

v.

UNITED STATES OF AMERICA

Respondent.

MOTION FOR LEAVE TO

PROCEED

IN FORMA PAUPERIS

Pursuant to Title 18 U.S.C. §3006A(d)(6) and Rule 39 of this Court, Petitioner, Verl Hadley, requests leave to file the enclosed Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit without prepayment of fees or costs and to proceed in forma pauperis. Petitioner was represented by counsel appointed pursuant to Title 18 U.S.C. §3006A(d)(6) in the district court and on appeal to the Court of Appeals for the Ninth Circuit.

Respectfully submitted,

Dated: December 5, 1991

John Trebon
601 N. Humphreys
Flagstaff, AZ 86001
(602)774-2773

Attorney for Petitioner

No.

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1991

VERL HADLEY

Petitioner,

v.

UNITED STATES OF AMERICA

Respondent.

PROOF OF SERVICE

STATE OF ARIZONA)
) ss
County of Coconino)

John Trebon, being first duly sworn, deposes and states that he is a member of the Bar of the Supreme Court of the United States; that on December 5, 1991, the petition for writ of certiorari in the above entitled case was deposited in a United States post office mail box located in Flagstaff, Arizona, with priority postage prepaid, properly addressed to the Clerk of the Supreme Court of the United States, within the time allowed for filing said petition for writ of certiorari, with additional copies of the petition and affidavit of mailing to counsel for respondent and the Solicitor General, Department of Justice:

United States Attorney
230 N. 1st Ave., 4th Flr.
Phoenix, Arizona

Solicitor General
Department of Justice
Washington, D.C. 20530

Dated this 6th day of December, 1991, in Flagstaff, Arizona.

John Trebon, Affiant

SUBSCRIBED & SWORN to before me this 6 day of December, 1991, by John Trebon.

Notary Public

My Commission Expires:

MY COMMISSION EXPIRES JUNE 5, 1992

No. HUSK 8801075

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1991

VERL HADLEY

Petitioner,

v.

UNITED STATES OF AMERICA

Respondent.

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U.S. ATTORNEY
PHOENIX

MOTION FOR APPOINTMENT

OF COUNSEL

Verl Hadley was represented by the undersigned counsel appointed pursuant to Title 18 U.S.C. §3006A(d)(6) in the Court of Appeals for the Ninth Circuit and by appointed counsel before the district court. Mr. Hadley, by and through counsel, has applied to proceed before this court in forma pauperis. Mr. Hadley, through counsel, also requests that the undersigned counsel be appointed to represent him in all proceedings before this Court and, in addition, requests an order appointing counsel nunc pro tunc for purposes of preparing and submitting the Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted,

Dated: December 5, 1991

John Trebon
601 N. Humphreys
Flagstaff, AZ 86001
(602)774-2773
Attorney for Petitioner

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No. 91-1446

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1991

VERL HADLEY

Petitioner,

v.

UNITED STATES OF AMERICA

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

John Trebon
Ward, Blue & Trebon
P.O. Box 789
601 N. Humphreys
Flagstaff, Arizona 86002
(602) 779-1713

Counsel for Petitioner

December 6, 1991

No.

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1991

VERL HADLEY

Petitioner,

v.

UNITED STATES OF AMERICA

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

John Trebon
Ward, Blue & Trebon
P.O. Box 789
601 N. Humphreys
Flagstaff, Arizona 86002
(602) 779-1713

Counsel for Petitioner

December 6, 1991

QUESTIONS PRESENTED

(1) If "intent" is not a genuine or disputed issue in a criminal trial, should the government be allowed to admit overwhelming amounts of uncharged misconduct evidence to a jury under the ruse of proving a technical issue of "intent" required by federal statute?

(2) Should the accused citizen be allowed to stipulate that the requisite "intent" exists in a criminal case in order to remove a technical issue of "intent" as a disputed issue at trial when the accused citizen's sole defense at trial is that he or she did not commit the acts charged in the indictment?

(3) Should the balancing test of Rule 403, Federal Rules of Evidence, require federal courts to consider the accused citizen's stipulation to concede the issue of "intent" as a factor in order to balance the probative value and prejudicial effect of prior misconduct evidence offered by the government?

(4) Should the well-reasoned position of the Second Circuit, allowing a technical issue of "intent" to be removed from criminal cases by the accused citizen as part of a Rules 403 and 404(b) analysis, be approved by this Court over the rigid, vague, and illogical standard seemingly employed by the Ninth Circuit?

LIST OF PARTIES

The caption of the case contains the names of all parties.

TABLE OF CONTENTS

Questions Presented i

List of Parties i

Table of Contents ii

Table of Authorities iii

Introduction 1

Opinion Below 3

Jurisdiction 3

Statement of Case 4

Reasons for Granting the Writ

I. The decision of the Court of Appeals for the Ninth Circuit in the Hadley case conflicts with a series of well-reasoned opinions from the Court of Appeals for the Second Circuit. One of the most important issues facing our judicial system in criminal cases today relates to the use or misuse of prior misconduct evidence under Rule 404(b) of the Federal Rules of Evidence. The decisions reached between the various circuit courts are not only inconsistent, but treat one of the most fundamental rules of evidence in a dramatically different manner. 9

II. The exercise of this Court's power of supervision is appropriate in order to provide authoritative and principled guidelines to the use of prior misconduct evidence under Rules 403 and 404(b) of the Federal Rules of Evidence. The conflict between the circuits should be resolved. The decision of the Court of Appeals for the Ninth Circuit is poorly reasoned and dilutes the accused citizen's right to a fair trial and an objective finding of guilt or innocence. 10

Conclusion 20

Appendix - Opinion of the Court of Appeals for the Ninth Circuit dated November 14, 1990;
Order Denying Petition for Rehearing and Rejection of Suggestion for Rehearing En Banc;
Rules 403 and 404 of the Federal Rules of Evidence.

TABLE OF AUTHORITIES

CASES	PAGE
Carter v. District of Columbia, 795 F.2d 116 (D.C. Cir. 1986)	12
Clark v. State, 693 S.W.2d 35, 38 (Tex. App. 1985)	14
Coler v. State, 418 So.2d 239, 239 (Fla. 1982)	19
State v. Roach, 712 P.2d 674, 676 (Idaho 1985)	15, 19
State v. Smith, 725 P.2d 951, 952, (Wash. 1986)	15
State v. Treadaway, 586 P.2d 1061, 1065 (Ariz. 1977)	15
United States v. Beechum, 582 F.2d 898, 914 (5th Cir. 1978), cert. denied, 440 U.S. 920 (1979)	12
United States v. Colon, 880 F.2d 650 (2nd Cir. 1989)	11, 19
United States v. Dilliole, 597 F.2d 102, 106 (7th Cir. 1979), cert. denied, 422 U.S. 946 (1979)	12
United States v. Ferrer-Cruz, 899 F.2d 135, 138 (1st Cir. 1990)	12
United States v. Figueroa, 618 F.2d 934, 941-42 (2nd 1980)	11, 15
United States v. Gruttodauro, 818 F.2d 1323, 1327-28 (7th Cir. 1987)	11
United States v. Manafzadeh, 592 F.2d 81, 87 (2nd Cir. 1979)	11
United States v. O'Connor, 580 F.2d 38, 41 (2nd Cir. 1978)	11
United States v. Robinson, 560 F.2d 507, 515 (2nd Cir. 1977), cert. denied, 435 U.S. 905 (1978)	15
United States v. Shackleford, 738 F.2d 776, 781 (7th Cir. 1984)	13
United States v. Verl Hadley, 918 F.2d 848 (9th Cir. 1990)	3, 16
United States v. Williams, 577 F.2d 188 (2nd Cir. 1978), cert. denied, 439 U.S. 868 (1978)	11

STATUTORY AUTHORITIES

A.R.S. Section 13-1410 5

Rule 13.1 of the Rules of the Supreme Court of the United States 4

Rule 403, Federal Rules of Evidence 16, 19

Rule 404(b), Federal Rules of Evidence . . . 1, 4, 8, 9, 16, 19

Title 18 U.S.C. Sec. 2244(a)(3) 5

Title 18 U.S.C. Sec. 2245(3) 5, 13

Title 18, U.S.C. Sec. 2241(a)(1) 5

Title 28, U.S.C. Sec. 1254(1) 4

BOOKS AND TREATISES

Borchard, Convicting the Innocent (1932) 14

Edward J. Imwinkelried, Uncharged Misconduct Evidence, Sec. 5:10, at p. 5-21 (Callaghan & Co. 1984) 13, 16

Greene and Loftus, When Crimes Are Joined at Trial, Vol. 9, Law and Human Behavior, p. 193 (1985) 14

Kalven and Zeisel, The American Jury, pp. 160-61, 178-79 (1966) 14

Louisell & Mueller, Federal Evidence, Vol. 2, Sec. 140, at pp. 116-17 (1978) 12

Tanford, Penrod, and Collins, Decision Making in Joined Criminal Trials: The Influence of Charge Similarity, Evidence Similarity, and Limiting Instructions, Vol. 9 Law and Human Behavior, p. 319 (1985) 14

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No.

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VERL HADLEY

Petitioner,

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Respondent.

The petitioner, Verl Hadley, by and through attorney, petitions for a writ of certiorari to review the judgment and decision of the United States Court of Appeals for the Ninth Circuit.

—

INTRODUCTION

One of the most important issues facing our judicial system in criminal cases today relates to the use or misuse of prior misconduct evidence under Rule 404(b) of the Federal Rules of Evidence. The decisions reached in each of the various circuits are inconsistent. In particular, the general standards of admissibility utilized by the Ninth Circuit allow each three-judge panel to affirm or reverse each case by factually distinguishing one case from another. In essence, the standards mean nothing. Criminal defendants are forced to play a game of Russian roulette before the Circuit Courts.

The admissibility of prior bad acts under Rule 404(b) is particularly important in cases where the accused, like Mr. Hadley, faces criminal prosecution for the first time. Although Mr. Hadley had never been convicted of any previous crime, the government was allowed to present layer upon layer of uncharged misconduct evidence and unverified insinuations of behavioral propensities toward minor children on the part of Mr. Hadley. Mr. Hadley was bludgeoned into conviction through the use of prior misconduct evidence, which clearly overshadowed all the other evidence in the case.

The steady barrage of prior misconduct evidence was supposedly admitted for the purpose of establishing the technical issue of "intent" in spite of the fact that "intent" was never a contested issue at trial nor a genuine issue of fact. Although Rule 404

expressly precludes the use of prior misconduct evidence to establish criminal propensity, virtually unlimited prior misconduct evidence was admitted against Mr. Hadley under the ruse of establishing "intent". The government used the prior acts as a basis for arguing criminal propensity during closing argument.

The trial court allowed uncharged acts of sexual misconduct that supposedly occurred seventeen years earlier to be considered by the jury against Mr. Hadley. The Court admitted evidence of dozens of other acts of sexual misconduct even though none of them resulted in conviction. In the end, it was simply impossible for Mr. Hadley to defend against both the counts listed within the indictment, as well as, a flood of uncharged misconduct evidence that overshadowed all other evidence in the case. Since "intent" was not a genuine issue, the prejudicial evidence was unnecessary and harmful.

Mr. Hadley was convicted as a result of a stinging character assassination. The government accused him of socializing with younger males, insisted that he had a reputation for touching male students in class, and insinuated sexual impropriety because he allowed minors to drive his automobile. As all trial lawyers know, the type of character assassination used against Mr. Hadley is extremely effective. Mr. Hadley was convicted not because he was proven guilty of the charges contained within the indictment, but because no jury could let him go after hearing a life-long history

of supposed misdeeds. A compromise verdict resulted. Justice was severely compromised as well.

The Court of Appeals for the Second Circuit has adopted intelligent guidelines for considering the propriety of admitting prior bad acts when "intent" is not a genuine or contested issue at trial. The Ninth Circuit has refused to follow the intelligent guidelines adopted the Second Circuit and other circuits. This Court's supervisory powers should be invoked. This Court has not previously addressed this important issue.

OPINION BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit in the case of United States v. Verl Hadley is reported at 918 F.2d 848 (9th Cir. 1990). The decision of the Court of Appeals for the Ninth Circuit affirmed the criminal conviction of Verl Hadley and supported the use of extensive uncharged misconduct evidence. On September 9, 1991, the Court of appeals issued an order denying Mr. Hadley's petition for rehearing and rejected the suggestion for rehearing en banc. The opinion of the Court of Appeals for the Ninth Circuit and the order denying rehearing are included within the Appendix to this petition.

JURISDICTION

The opinion and judgment of the United States Court of Appeals for the Ninth Circuit was filed on November 14, 1990. The order denying Mr. Hadley's petition for rehearing and suggestion for rehearing en banc was entered on September 29, 1990. The

jurisdiction of this court to review the judgment of the Ninth Circuit is invoked under Title 28, U.S.C. Sec. 1254(1), and Rule 13.1 of the Rules of the Supreme Court of the United States.

STATEMENT OF THE CASE

Verl Hadley was a teacher on the Navajo Indian Reservation. He was charged with sexual misconduct involving several students. The indictment against Mr. Hadley followed a series of other cases involving charges of sexual misconduct against teachers on the Navajo Indian Reservation, as well as, a congressional investigation. But, Mr. Hadley was the first Navajo Indian to be charged in the series of cases.

Mr. Hadley was charged with eleven counts of sexual misconduct involving five minor children. A few months before trial, the district court ruled that counts VII through XI of the superseding indictment would be severed -- for purposes of trial -- from counts I through VI. But, the trial Judge subsequently ruled that evidence relating to the first six counts of the superseding indictment would be admissible at the first trial as prior bad acts under Rule 404(b) of the Federal Rules of Evidence. R.T., April 27, 1989, p. 8.

As a result, Mr. Hadley's first and only trial involved five acts of alleged sexual misconduct against three students. Mr. Hadley was convicted of counts VII, VIII, and IX involving Amadee Roy, but was acquitted of counts X and XI involving two other students. Mr. Hadley was sentenced to serve 108 months on Counts

VIII and IX, but was also sentenced to 30 years consecutively on Count VII.

Counts VII and VIII of the superseding indictment charged Mr. Hadley with "aggravated sexual abuse" under Title 18, U.S.C. Sec. 2241(a)(1). In essence, Mr. Hadley was charged with knowingly causing another person to engage in a sexual act by using force against the other person, namely Amadee Roy. Counts IX and XI of the superseding indictment charged Mr. Hadley with "abusive sexual contact" under Title 18 U.S.C. Sec. 2244(a)(3). Both counts essentially charged Mr. Hadley with engaging in "sexual contact" by touching each of the boys. According to federal law, the sexual contact must occur with the intent to arouse or gratify the sexual desire of any person. See Title 18 U.S.C. Sec. 2245(3).

Count X charged Mr. Hadley with child molestation under Arizona law, A.R.S. Section 13-1410, by directly touching the private parts of Jonathan Tsosie. Once again, Arizona law required Mr. Hadley to touch Jonathan Tsosie because of an unnatural sexual interest in children.

Mr. Hadley's defense at trial was simply that he did not commit any of the acts alleged against him. Mr. Hadley argued that the acts did not take place. During trial, Mr. Hadley expressly agreed to stipulate that each of the acts, if they occurred, took place for the purpose of sexual gratification or an unnatural sexual interest in children. In other words, the issue of "intent" was not a contested issue at trial. The only genuine issue was

whether or not Mr. Hadley actually touched or molested the children named within the indictment.

The government turned down Mr. Hadley's offer to stipulate that the prerequisite "intent" or motive existed for each count and the trial court insisted that the government could prove "intent" in any manner it deemed appropriate. Therefore, under the ruse of proving "intent", the government was unrestrained in its ability to introduce prior misconduct evidence on the technical issue of "intent" even though it was not a material or disputed issue at trial, including the following:

1. Judge Carroll ruled that all of the alleged acts of sexual misconduct between Mr. Hadley and a former student, Cory Kay, contained within counts I through VI of the superseding indictment were admissible at the first trial. Each of the first six counts of the superseding indictment involving Cory Kay alleged involuntary sodomy on the part of Mr. Hadley. But, Cory Kay was not only allowed to testify about the acts focused upon within each of the first six counts, he was also allowed to testify about numerous, unspecified prior bad acts. Cory Kay testified that he engaged in anal intercourse with Mr. Hadley on more than 10 occasions. R.T., Vol. 5, p. 897.

2. The government was allowed to introduce testimony about prior sexual misconduct dating back seventeen years. The trial court justified the admission of prior bad act evidence dating back seventeen years because "the methods of proof that are available to

the government" in cases from Indian Reservations, where people are "unsophisticated", require a more liberal rule regarding uncharged misconduct evidence. R.T., Vol. 9, pp. 1644-45.

Kyle Hartman was allowed to testify that he engaged in a series of sexual relations with Mr. Hadley from 1972 to 1976 when he was a student in Kayenta, Arizona. At that time, Mr. Hadley was employed as a teacher's aid. R.T., Vol. 9, pp. 1663-73. Mr. Hartman, age 27, was allowed to testify about numerous, specific acts of sodomy that supposedly occurred with Verl Hadley when he was in grade school. Mr. Hartman also testified that he sodomized Mr. Hadley as well. R.T., Vol. 9, p. 1670.

Judge Carroll reasoned that the prior bad acts relating to sodomy would be helpful to the jury in determining Mr. Hadley's motive in merely touching other boys. In other words, according to Judge Carroll, prior bad act testimony would be admissible to show the jury that Mr. Hadley's true motive in touching children was eventually to lead up to sodomy. R.T., Vol. 4/27/89, p. 8. Yet, somehow, Judge Carroll concluded that he was not admitting the prior bad acts for the purpose of showing propensity.

Judge Carroll summarized his position by stating that, "The jury ought to know what kind of person Mr. Hadley is, because it relates to his motive for doing things, or his intention for doing things with these children. ... Common sense tells me that the jury ought to know something about Mr. Hadley. ... because it does deal with his motives, his intention or whether or not he is a good

guy ...". R.T., Vol. 3, pp. 670-672. The obvious use of the prior misconduct evidence was to establish propensity, which is normatively precluded by Rule 404(b), Federal Rules of Evidence.

3. On cross-examination of Mr. Hadley, the government, over strenuous objections by the defense, continuously asked Mr. Hadley whether he gave automobile rides to minor students; whether he ever had any male students as guests at his residence; whether he ever provided any alcohol to any male students; whether or not he had a reputation for touching students in his classes; and whether he had a reputation for tickling students on their thighs or their backs.

4. The government was allowed to question Mr. Hadley about a traffic citation that he received during 1976 for supposedly allowing an unauthorized minor to drive his automobile. Judge Carroll ruled that a criminal defendant may be cross-examined on extrinsic matters or prior bad acts more broadly then any other witness. R.T., Vol. 8, pp. 1426, 1435 and Vol. 9, pp. 1632-33. Therefore, Mr. Hadley could be cross-examined about a traffic citation that he received from a police officer in 1976, even though no conviction resulted. Although the government presented no evidence of sexual misconduct, counsel for the government insinuated that misconduct occurred. Since counts VII and VIII involving Amadee Roy involved alleged misconduct in an automobile, the government used the 1976 incident as another prior bad act to establish propensity. According to Judge Carroll, Mr. Hadley "puts

his character in issue when he takes the stand." R.T., Vol. 7, p. 1343.

During closing argument, the government specifically used the testimony of Kyle Hartman to show Mr. Hadley's propensity to engage in sexual conduct with minor children. The government used the testimony of Kyle Hartman to show that Mr. Hadley lied when he said that he did not have sexual intercourse with other, specified minor children. R.T., Vol. 9, p. 1729. In the same vein, counsel for the government also used the 1976 traffic ticket to argue propensity against Mr. Hadley. R.T., Vol. 9, p. 1796. The government hinted that both the testimony of Cory Kay and Kyle Hartman could be used to show Mr. Hadley's sexual propensities. R.T., Vol. 9, p. 1798.

REASONS FOR GRANTING THE WRIT

The decision of the Court of Appeals for the Ninth Circuit in the Hadley case conflicts with a series of well-reasoned opinions from the Court of Appeals for the Second Circuit. One of the most important issues facing our judicial system in criminal cases today relates to the use or misuse of prior misconduct evidence under Rule 404(b) of the Federal Rules of Evidence. The decisions reached between the various circuit courts are not only inconsistent, but treat one of the most fundamental rules of evidence in a dramatically different manner.

The exercise of this Court's power of supervision is appropriate in order to provide authoritative and principled guidelines to the use of prior misconduct evidence under Rules 403 and 404(b) of the Federal Rules of Evidence. The conflict between the circuits should be resolved. The decision of the Court of Appeals for the Ninth Circuit is poorly reasoned and dilutes the accused citizen's right to a fair trial and an objective finding of guilt or innocence.

The only relevant question at trial was whether or not Mr. Hadley actually committed sexual misconduct with the minor children. Mr. Hadley never contended that he innocently or accidently or mistakenly sodomized or touched the private parts of the minor children. Instead, Mr. Hadley simply denied that he participated in any of the charged offenses. The government was able to use the issue of "intent" as a ruse to admit a steady stream of prior misconduct evidence in order to prejudice the jury against Mr. Hadley.

We not only submit that Mr. Hadley failed to receive a fair trial, but also that some principled logic must apply to Rule 404(b) in cases where "intent" is nothing more then a facade, rather then a genuine issue. The decision of the Court of Appeals for the Ninth Circuit applies no principled limits to the introduction of Rule 404(b) evidence. Clearly, some limits should apply. If any rational limit applies, then the facts of this case show that any rational limit was exceeded. Fortunately, other

circuits have applied rational limitations upon the use of Rule 404(b) evidence. Since a clear split in the circuits exists, this Court should review Mr. Hadley's case in order to resolve the differences between the circuits and to apply fundamental rules of justice in one of the most important and troubling areas of evidence encountered by our criminal justice system.

The Second Circuit, for instance, has now held that evidence of prior bad acts is not admissible under Rule 404(b) if the defendant affirmatively acts to remove the issue of intent from the case. United States v. Colon, 880 F.2d 650 (2nd Cir. 1989); United States v. Figueroa, 618 F.2d 934, 941-42 (2nd 1980); United States v. Manafzadeh, 592 F.2d 81, 87 (2nd Cir. 1979); United States v. O'Connor, 580 F.2d 38, 41 (2nd Cir. 1978); United States v. Williams, 577 F.2d 188 (2nd Cir. 1978), cert. denied, 439 U.S. 868 (1978). Other courts have held that evidence of prior misconduct under Rule 404(b) cannot be admitted unless specific intent is actually a disputed issue in the case. See, e.g., United States v. Gruttodauro, 818 F.2d 1323, 1327-28 (7th Cir. 1987)(Mental state inferred from surrounding circumstances).

Other circuits tend to follow the position and logic of the Second Circuit. If "intent" or knowledge is not a genuine issue at trial, then the incremental value of the uncharged misconduct evidence is not only substantially reduced, but the danger of unfair prejudice is needlessly increased. The Ninth Circuit, as represented in the Hadley decision, is especially rigid in allowing

evidence of prior bad acts without focusing upon the genuine need for the evidence and less prejudicial alternatives. See, e.g., United States v. Ferrer-Cruz, 899 F.2d 135, 138 (1st Cir. 1990)("We agree with Ferrer that, were knowledge and intent not issues in the case, the prejudicial effect of the past conviction would inevitably overcome the need for the evidence."); Carter v. District of Columbia, 795 F.2d 116 (D.C. Cir. 1986)(error to admit evidence in light of much less prejudicial alternative); United States v. Dilliole, 597 F.2d 102, 106 (7th Cir. 1979), cert. denied, 422 U.S. 946 (1979)(trial court must assess the usefulness of the government's need for the evidence); United States v. Beechum, 582 F.2d 898, 914 (5th Cir. 1978), cert. denied, 440 U.S. 920 (1979)("If the defendant's intent is not contested, then the incremental probative value of the extrinsic offense is inconsequential when compared to its prejudice; therefore, in this circumstance the evidence is uniformly excluded."). Also see Advisory Committee' Note to Rule 403 and 404(b)("The determiniation must be made whether the danger of undue prejudice outweighs the probative value of the evidence in view of the availability of other means of proof and other factors appropriate for making decisions of this kind under Rule 403."); Vol. 2, Louisell & Mueller, Federal Evidence, Sec. 140, at pp. 116-17 (1978)("If, on the contrary, the point is conceded, or strongly supported by other proof, then the need factor points toward exclusion, and should weigh heavily, perhaps decisively, on the scales.").

Mr. Hadley's sole defense at trial was that he did not commit the acts alleged within the indictment. Mr. Hadley, through counsel, unequivocally agreed to stipulate that the "intent" required by the federal statutes existed.

> Finally, as previously stated, Mr. Hadley does not contest the issue of "intent" or "motive" in this case. Indeed, Mr. Hadley's attorney has previously stated that he will stipulate that the requisite intent exists in this case. In other words, Mr. Hadley is willing to affirmatively act to remove the issue of intent from this case.

Supplemental Memorandum submitted by Mr. Hadley during trial, at p.3 (CR 117). Both the district court and the Court of Appeals for the Ninth Circuit rejected Mr. Hadley's proffered stipulation and the reasoning of a series of persuasive cases from the Second Circuit.

Moreover, proof of the acts charged against Mr. Hadley tended to infer the existence of intent, thereby removing the need for prior misconduct evidence. See, United States v. Shackleford, 738 F.2d 776, 781 (7th Cir. 1984). One simply does not engage in sexual acts without the intent to "gratify the sexual desires of any person". See Title 18, U.S.C. Section 2245(3). "The ideal case for exclusion [of prior bad acts] is one in which ... the nature of the crime is such that accident would not be a plausible defense." Edward J. Imwinkelried, Uncharged Misconduct Evidence, Sec. 5:10, at p. 5-21 (Callaghan & Co. 1984).

The use of prior bad acts in cases charging misconduct against children is particularly troubling and prejudicial. Substantial prejudice is guaranteed.

> [T]o bombard the [factfinder] with evidence that appellant is a child abuser in general . . . presents a classic example of the kind of evidence which hopelessly distracts the [factfinder] from the issues [it is] called upon to resolve and adulterates the deliberative process.

Clark v. State, 693 S.W.2d 35, 38 (Tex. App. 1985). Objective data indicates beyond question that evidence of prior bad acts is usually fatal to a defendant's case. A fair trial may be rendered futile in the face of evidence of other misconduct by the accused. Limiting instructions are simply not effective. See, e.g., Greene and Loftus, When Crimes Are Joined at Trial, Vol. 9, Law and Human Behavior, p. 193 (1985); Tanford, Penrod, and Collins, Decision Making in Joined Criminal Trials: The Influence of Charge Similarity, Evidence Similarity, and Limiting Instructions, Vol. 9 Law and Human Behavior, p. 319 (1985); Wissler and Saks, On the Inefficacy of Limiting Instructions, Vol. 9 Law and Human Behavior, P. 37 (1985); Kalven and Zeisel, The American Jury, pp. 160-61, 178-79 (1966); Borchard, Convicting the Innocent (1932).

Moreover, counsel for Mr. Hadley expressly requested that the trial court wait until the close of Mr. Hadley's case to determine whether "intent" or "motive" were contested issues in the case. Then, a more informed decision could be made about the probative value of the proffered evidence. Judge Carroll, however, refused

to stay his hand. R.T., Vol. 3, p. 674. Other circuits have found that the decision to allow prior misconduct evidence on the issue of "intent" should wait until the defendant has put his case before the jury in order to determine whether or not "intent" is actually a contested issue in the case. See, United States v. Figueroa, 618 F.2d 934, 939 (2nd 1980); United States v. Robinson, 560 F.2d 507, 515 (2nd Cir. 1977), cert. denied, 435 U.S. 905 (1978). But, once again, the Ninth Circuit has refused to adopt rules that carefully regulate the use of prior misconduct evidence.

> We are particularly reluctant when the evidence is of such a highly prejudicial nature that some jurists and commentators regard it as nearly dispositive, making the guilty verdict almost a formality. [cites omitted].

State v. Treadaway, 586 P.2d 1061, 1065 (Ariz. 1977). Indeed, the certainty of prejudice in allowing evidence of prior bad acts in cases of sexual misconduct "is at its highest." State v. Smith, 725 P.2d 951, 952, (Wash. 1986).

> Roach's defense is that he did not commit the act. He does not, as well he could not, contend that he committed the act with innocent intent. [cite omitted] ... we do not believe that intent was sufficiently at issue to allow the questioned evidence as probative of intent.

State v. Roach, 712 P.2d 674, 676 (Idaho 1985)(Lewd and Lascivious conduct with a minor child).

The apparent desire of the Ninth Circuit and other circuits to allow extensive use of prior misconduct evidence in cases involving

allegations of sexual misconduct against children not only creates a split in the circuits, but allows an unprecedented and unjustified diversion from the Federal Rules of Evidence.

> It became clear that many courts were not applying the normal requirements in sex offense prosecutions; there was a discernible distinction between the standards for admitting uncharged misconduct in sex and nonsex offense cases. The courts were routinely straining and distorting the plain doctrine to rationalize the admission of evidence of the defendant's uncharged sexual misconduct. In some jurisdictions, intellectual honesty triumphed, and the courts eventually acknowledged that they were recognizing a special exception to the norm prohibiting the use of the defendant's disposition as circumstantial proof of conduct.

Edward J. Imwinkelried, Uncharged Misconduct Evidence, Sec. 4:14 at p. 4-31 (1984)(Callaghan & Co. 1984).

The decision in United States v. Verl Hadley, 918 F.2d 848, 852 (9th Cir. 1990), applies a superficial and unyielding view of Rules 404(b) and 403 of the Federal Rules of Evidence.

> The government must prove every element of a crime beyond a reasonable doubt [cite omitted]. This burden is not relieved by a defendant's promise to forgo argument on an issue [cite omitted]. Hadley cannot preclude the government from proving intent simply by focusing his defense on other elements of his crime.

But, Mr. Hadley did not focus his defense on any "element" of the crime; his defense was simply and completely that he did not commit the acts charged.

The reasoned position of the Second Circuit is clearly superior to the concrete inflexibility offered by the Hadley decision. The position held by the Second Circuit gives true meaning to Rule 403 (balance probative value and prejudicial effect of prior misconduct evidence) and protects the right of the accused citizen to a fair trial. The position taken by the Ninth Circuit dilutes the accused citizen's right to a fair trial and leaves the balancing test of Rule 403 as a sterile concept without viable guidelines or vitality.

> Strictly speaking, Colon's plea of not guilty to the charge that he aided and abetted Alvarado's sale of heroin put his state of mind in dispute, as the government bore the burden of proving that Colon had the specific intent that his actions bring about the sale. See United States v. Aiello, 864 F.2d 257, 262-63 (2d Cir.1988) (quoting United States v. Wiley, 846 F. 2d 150, 154 (2d Cir.1088) (in turn quoting United States v. Zambrano, 776 F.2d 1091, 1097 (2d Cir.1988). Nevertheless, in some circumstances, the nature of a defense put forth by the defendant may reveal that "[k]nowledge and intent, while technically at issue, [are] not really in dispute." United States v. Benedetto, 571 F.2d 1246, 1249 (2d Cir.1978). In some cases, the defendant may specifically offer to stipulate to an issue and thereby remove it from the case. See Mohel, 604 F.2d at 752-54; Manafzahed, 592 F.2d at 87.
>
> * * *
>
> In Manafzadeh, 592 F.2d 81, upon which Colon primarily relies, we reversed convictions on two counts of unlawfully transporting or causing to be transported falsely made checks. We held that evidence of subsequent crimes was erroneously admitted to prove intent because intent had not truly been

> in dispute. As we noted, "Manafzadeh's defense was not that he had innocently or mistakenly participated in the preparation or deposit of the ... checks .... His defense was that he had never been involved in the creation or negotiation of these fraudulent checks at all." Id. at 85. Moreover, the defendant repeatedly offered to stipulate to intent if the jury found that he had participated in the creation or deposit of the checks. Id. Thus, we concluded, "intent was not dispute and any doubt about its nonexistence as an issue was dispelled by the offer of the defendant to stipulate to the existence of the requisite intent if the other elements of the offense should be found." Id. at 87.
>
> In Ortiz, a defendant was charged with possession of heroin with intent to distribute. We found that a "mistaken identity" defense by Ortiz claiming that she had never possessed any heroin, had it been adhered to, would have been sufficient to remove the issue of intent from the case. We stated, "intent is not placed in issue by a defense that the defendant did not do the charged act at all." Ortiz, 857 F.2d at 904; see also Figueroa, 618 F.2d at 939-42 (defendant Acosta did not challenge proof that bag contained heroin, but instead denied the episode had occurred at all); Mohel, 604 F.2d at 752 (defendant did not claim that he had thought he was selling legal substance, but that he had not participated in any transaction); Benedetto, 571 F.2d at 1249 (defendant did not claim that he had taken money innocently or mistakenly, but that he had not taken it at all).
>
> Our cases have thus recognized a distinction between defense theories that claim that the defendant did not do the charged act at all, and those that claim that the defendant did the act innocently or mistakenly, with only the latter truly raising a disputed issue of intent. See 2 J. Weinstein & M. Berger, Weinstein's Evidence ¶404[09], at 494-64-404-66 (1988).

United States v. Colon, 880 F.2d 650 (2nd Cir. 1989).

The position taken by the Second Circuit has been followed by enlightened state courts as well. Coler v. State, 418 So.2d 239, 239 (Fla. 1982); State v. Roach, 712 P.2d 674, 676 (Idaho 1985).

Mr. Hadley was bludgeoned into conviction with the use of prior misconduct evidence. The trial court allowed layer upon layer of uncharged misconduct evidence for the supposed purpose of establishing "intent" even though "intent" was not a genuine issue at trial. Indeed, it would have been impossible for Mr. Hadley to argue that he touched the private parts of minor students or tried to put his penis in their anus for some purpose other than sexual gratification.

The perfunctory affirmance by the Ninth Circuit shows the great need for further analysis of Rules 403 and 404(b). Some of the federal circuits now employ intellectual honesty by ruling that prior sexual misconduct evidence is inappropriate unless "intent" is a genuine and disputed issue at trial. In light of Mr. Hadley's position at trial and his express willingness to stipulate that the requisite "intent" existed, then it is beyond doubt that "intent" was not a disputed issue in this case. This Court should apply principled logic to the use of prior misconduct evidence and approve the position of the Ninth Circuit.

Therefore, we request that this court accept Mr. Hadley's Petition for Certiorari to the Court of Appeals for the Ninth Circuit. We request that this Court return some semblance of logic to the use of prior misconduct evidence and return fundamental fairness to serious criminal trials.

CONCLUSION

For all of the foregoing reasons, Verl Hadley requests that the Supreme Court issue a Writ for Certiorari to review the decision and judgment of the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted.

Dated: December 6, 1991

John Trebon
Ward, Blue & Trebon
P.O. Box 789
601 N. Humphreys
Flagstaff, Arizona 86002
(602) 779-1713

Attorney for Petitioner

APPENDIX

[8, 9] The test for validity of probation conditions, even where preferred rights are affected, is "whether the limitations are primarily designed to affect the rehabilitation of the probationer or insure the protection of the public." *Id.* at 265, n. 14. To apply this test, our court "must determine whether the sentencing judge imposed the conditions for permissible purposes, and then it must determine whether the conditions are reasonably related to the purposes." *United States v. Terrigno*, 838 F.2d 371, 374 (9th Cir.1988). "[T]he standard for determining the reasonable relationship between probation conditions and the purposes of probation is necessarily very flexible precisely because 'of our uncertainty about how rehabilitation is accomplished.'" *Id., quoting Consuelo-Gonzalez*, 521 F.2d at 264.

[10] The condition of probation imposed here meets this test. The record supports the conclusion that the judge imposed the requirement of a public apology for rehabilitation. Neither Clark nor Jeffery have admitted guilt or taken responsibility for their actions. Therefore, a public apology may serve a rehabilitative purpose. *See Gollaher v. United States*, 419 F.2d 520, 530 (9th Cir.) ("It is almost axiomatic that the first step toward rehabilitation of an offender is the offender's recognition that he was at fault."), *cert. denied*, 396 U.S. 960, 90 S.Ct. 434, 24 L.Ed.2d 424 (1969). Because the probation condition was reasonably related to the permissible end of rehabilitation, requiring it was not an abuse of discretion.

AFFIRMED.

UNITED STATES of America, Plaintiff-Appellee,

v.

Verl HADLEY, Defendant-Appellant.

No. 89-10428.

United States Court of Appeals, Ninth Circuit.

Argued and Submitted Aug. 16, 1990.

Decided Nov. 14, 1990.

Defendant was convicted in the United States District Court, District of Arizona, Earl H. Carroll, J., of aggravated sexual abuse and abusive sexual contact. Defendant appealed. The Court of Appeals, Wallace, Circuit Judge, held that: (1) district court did not abuse its discretion in admitting evidence of defendant's prior acts of sexual abuse; (2) district court did not abuse its discretion in admitting explanatory expert witness testimony; (3) there was sufficient evidence of defendant's intent to engage in sexual act with minor to support his conviction for attempted aggravated sexual abuse; and (4) Sentencing Guidelines were not applicable to defendant's aggravated sexual abuse of minor which occurred prior to Guidelines' effective date.

Affirmed.

1. Criminal Law ⇐371(1)

If used to prove intent, evidence of prior bad act must be similar to offense charged. Fed.Rules Evid.Rule 404(b), 28 U.S.C.A.

2. Criminal Law ⇐374

Jury reasonably could have concluded that aggravated sexual abuse defendant had previously sodomized and abused witnesses, as required for witnesses' testimony to be admissible as evidence of prior bad acts; witnesses testified in detail about sexual abuse inflicted upon them. Fed. Rules Evid.Rule 404(b), 28 U.S.C.A.

3. Criminal Law ⇐369.2(5)

Claimed pattern of sodomy and sexual molestation of witness by defendant, which ceased ten years prior to acts for which defendant was charged with aggravated sexual abuse and abusive sexual contact, was not too remote to be admissible as prior bad act evidence. Fed.Rules Evid. Rule 404(b), 28 U.S.C.A.

4. Criminal Law ⇐371(9)

Witnesses' prior bad act testimony that aggravated sexual abuse defendant had sodomized and sexually abused them when they were children was sufficiently similar to offense charged to allow admission of testimony as evidence of intent; in all cases, defendant isolated his student victims and performed acts of sexual gratification upon them, often including anal intercourse. Fed.Rules Evid.Rule 404(b), 28 U.S.C.A.

5. Criminal Law ⇐328

Government's burden to prove every element of crime beyond reasonable doubt is not relieved by defendant's promise to forego argument on issue.

6. Criminal Law ⇐371(9)

Possibility of unfair prejudice from witnesses' prior bad act testimony, that aggravated sexual abuse defendant had sodomized and sexually abused them when they were children, did not substantially outweigh probative value of evidence to establish intent. Fed.Rules Evid.Rules 403, 404(b), 28 U.S.C.A.

7. Witnesses ⇐318

Expert psychiatric testimony as to general behavior characteristics that may be exhibited in sexually abused children did not improperly bolster children's testimony in prosecution of defendant for aggravated sexual abuse and abusive sexual contact; testimony was limited to discussion of class of victims generally and merely assisted trier of fact in understanding evidence.

8. Criminal Law ⇐486(4)

Test allowing admission of evidence based on novel scientific technique only if technique is generally accepted as reliable in relevant scientific community was not applicable to expert's psychiatric testimony as to general behavior characteristics of sexually abused children, which was based upon expert's professional experience and did not employ any special techniques or models.

9. Criminal Law ⇐474.4(4)

Defendant convicted of aggravated sexual abuse and abusive sexual contact pointed to no specific prejudicial effect substantially outweighing probative value of expert psychiatric testimony as to general behavior characteristics of sexually abused children and, thus, there was no abuse of discretion in admission of testimony; testimony helped to explain testimony of abused children and, thus, rendered appreciable help to jury. Fed.Rules Evid.Rule 403, 28 U.S.C.A.

10. Criminal Law ⇐44

To constitute "attempt," there must be more than mere preparation to commit crime; there must be some appreciable fragment of crime in progress.

See publication Words and Phrases for other judicial constructions and definitions.

11. Sodomy ⇐6

There was sufficient evidence of defendant's intent to engage in sexual act with minor to support his conviction for attempted aggravated sexual abuse; defendant asked minor to sit on his lap while defendant was driving and tried to get minor to remove his pants, minor felt defendant getting erection while minor was sitting on defendant's lap, and similar sexual abuse had occurred a month before. 18 U.S.C.A. § 2241(a)(1).

12. Criminal Law ⇐1236

Sentencing Guidelines were not applicable to defendant's aggravated sexual abuse of minor, which occurred prior to Guidelines' effective date. U.S.S.G. § 1B1.1 et seq., 18 U.S.C.A.App.

John Trebon, Flagstaff, Ariz., for defendant-appellant.

Gary A. Husk, Asst. U.S. Atty., Phoenix, Ariz., for plaintiff-appellee.

Appeal from the United States District Court for the District of Arizona.

Before WALLACE, ALARCON and WIGGINS, Circuit Judges.

WALLACE, Circuit Judge:

Hadley appeals his convictions for aggravated sexual abuse in violation of 18 U.S.C. § 2241(a)(1) and abusive sexual contact in violation of 18 U.S.C. § 2244(a)(2). He argues that the district court abused its discretion by improperly admitting evidence of prior acts of sexual abuse and explanatory expert witness testimony. He contends that insufficient evidence exists to convict him on one of the three counts on which he was found guilty. Finally, Hadley challenges his sentence, on the ground that it was not imposed in accordance with the Sentencing Guidelines. The district court exercised jurisdiction pursuant to 18 U.S.C. § 3231. We have jurisdiction over this timely appeal pursuant to 28 U.S.C. § 1291. We affirm.

I

Hadley is a former elementary school teacher who taught for eleven years at the Bureau of Indian Affairs School (BIA school) on the Navajo Indian Reservation at Chilchinbeto, Arizona. Complaints of sexual molestation led to an investigation of Hadley, which resulted in an indictment charging him with eleven counts of sexual abuse involving five minor victims. The district court granted Hadley's motion to sever, and the subsequent trial dealt only with counts seven through eleven of the superseding indictment. Counts seven through nine charged Hadley with aggravated sexual abuse, attempted aggravated sexual abuse, and abusive sexual contact. These charges arose from allegations that Hadley had committed forcible anal intercourse and other acts of sexual abuse against Roy, a student at the BIA school.

Roy testified at trial to three separate incidents of sexual molestation by Hadley in late 1987 and early 1988. In addition, over Hadley's objection, the district court allowed other government witnesses to testify that Hadley had forcibly sodomized them when they were minors. The government also presented the expert testimony of Dr. Rosenzweig, a child psychiatrist, who testified on the issue of general behavior characteristics exhibited by victims of child sexual abuse.

The jury found Hadley guilty of the three crimes perpetrated against Roy. Hadley was acquitted on the remaining two counts, which involved less serious allegations by two other students. The district judge sentenced Hadley to 30 years' imprisonment for his conviction of aggravated sexual abuse as charged in count seven, and to 108 months for the convictions on counts eight and nine. The judge ordered that the sentences for counts eight and nine be served consecutively to the sentence for count seven, and imposed fines totaling $20,000.

II

Hadley first argues that the district court should not have admitted the prior bad act testimony of witnesses who testified that Hadley had sodomized and sexually abused them when they were children. We review a district court's decision to admit evidence of prior bad acts under Fed. R.Evid. 404(b) only for an abuse of discretion. *United States v. Brown*, 873 F.2d 1265, 1267 (9th Cir.1989). Indeed, we have held that Rule 404(b) is an "inclusionary rule," under which evidence is inadmissible "only when it proves nothing but the defendant's criminal propensities." *United States v. Diggs*, 649 F.2d 731, 737 (9th Cir.), *cert. denied*, 454 U.S. 970, 102 S.Ct. 516, 70 L.Ed.2d 387 (1981). Therefore, the district judge is "accorded wide discretion in deciding whether to admit such evidence." *Id.*

[1] Rule 404(b) allows the introduction of prior bad acts "as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." Fed.R.Evid. 404(b). We have held that evidence is admissible under Rule 404(b) if: (1) sufficient proof exists for the jury to find that the defendant committed the prior act; (2) the prior act was not too

remote in time; and (3) the prior act is introduced to prove a material issue in the case. *United States v. Ross*, 886 F.2d 264, 267 (9th Cir.1989) (*Ross*), *cert. denied*, — U.S. —, 110 S.Ct. 1818, 108 L.Ed.2d 947 (1990); *United States v. Spillone*, 879 F.2d 514, 518–20 (9th Cir.1989) (*Spillone*), *cert. denied*, — U.S. —, 111 S.Ct. 210, 112 L.Ed.2d 170 (1990). In addition, if used to prove intent, the prior act must be similar to the offense charged. *Id.* at 519.

[2] First, we hold that sufficient evidence of the prior bad acts existed for a jury to "reasonably conclude that the act[s] occurred and that the defendant was the actor." *Huddleston v. United States*, 485 U.S. 681, 689, 108 S.Ct. 1496, 1501, 99 L.Ed.2d 771 (1988). The witnesses testified in detail about the sexual abuse inflicted upon them by Hadley. This testimony clearly amounted to more than the "unsubstantiated innuendo" that the Supreme Court warned against in *Huddleston*. *Id.* Thus, the jury reasonably could have concluded that Hadley previously sodomized and abused these witnesses.

[3] Second, one witness testified to a regular pattern of sodomy and sexual molestation that began when the boy was ten years old, and lasted until 1977 when he was fifteen. Hadley argues that this act is too remote in time to justify admissibility. We have previously declined to adopt an inflexible rule regarding remoteness in the context of Rule 404(b). *See Ross*, 886 F.2d at 267; *Spillone*, 879 F.2d at 514. Hadley stopped sexually abusing this witness ten years prior to the abuse for which he was convicted. The district judge found that "there certainly is a similarity in space and practice" between the prior act and the offense charged. The similarity of the prior act to the offense charged outweighs concerns regarding its remoteness. Thus, we hold that the district judge did not abuse his discretion in admitting this testimony. *Cf. Ross*, 886 F.2d at 267 (admitting evidence of a prior act that occurred 13 years beforehand based on the similarity of the offenses); *Spillone*, 879 F.2d at 519 (admitting evidence of a conviction more than ten years old).

[4] Third, Hadley contends that the prior bad act evidence was not introduced to prove a material element in the case. Hadley was charged in count nine with abusive sexual contact. To demonstrate sexual contact, the government had to prove that Hadley acted "with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person." 18 U.S.C. § 2245(3). The district judge found that the prior acts "have to do with alleged activities of Mr. Hadley, of a sexually gratifying nature." In addition, the evidence helped to demonstrate specific intent, the proof of which was required in all three counts. On this basis, it was properly admitted. Of course, as pointed out above, if the prior acts are used to prove intent, those acts must be similar to the offense charged. The district judge found that they were, and we do not disagree. In all cases, Hadley isolated his student victims and performed acts of sexual gratification upon them, often including anal intercourse. We conclude that this similarity was sufficient to allow the admission of the prior acts as evidence of intent.

Hadley argues that *United States v. Powell*, 587 F.2d 443 (9th Cir.1978), requires a different result. Powell was convicted of conspiracy to possess marijuana with intent to distribute. *Id.* at 445. At trial the government offered proof of two prior convictions on three theories of relevance: intent, plan, and motive. *Id.* at 447. The district court refused to admit either of the prior convictions on the theories of intent or plan, but admitted one of the prior convictions as relevant to motive. *Id.* at 447–48. We reversed and remanded for a new trial. *Id.* at 449.

Hadley urges reliance on a single sentence in *Powell*: "When a defendant denies participation in the act or acts which constitute the crime, intent is not a material issue for the purpose of applying Rule 404(b)." *Id.* at 448. At trial, Hadley's defense was a denial of participation in the acts of which he was convicted; he offered not to argue the issue of intent. Thus, he contends, *Powell* precludes the government from proving intent with evidence of prior bad acts.

This is not the holding of *Powell*. Indeed, nothing in *Powell* on the issue of intent could have been its holding, because the district court's ruling on the issue was not challenged on appeal. Powell appealed the district court's decision to admit the prior conviction as relevant to motive. The district court's ruling on intent was uncontested on appeal. Powell did not challenge the district court's refusal to admit the evidence on the theory of intent, as this ruling was favorable to him. Significantly, the government did not cross-appeal. Thus, the statement relied on by Hadley was nonbinding dicta which cannot control the outcome in a subsequent case.

[5] Hadley's argument can be read to suggest we adopt the *Powell* dicta as persuasive authority. The statement, as interpreted by Hadley, goes too far. The government must prove every element of a crime beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 1074, 25 L.Ed.2d 368 (1970). This burden is not relieved by a defendant's promise to forgo argument on an issue. *See Spillone*, 879 F.2d at 518 (evidence of prior conviction properly admitted on issue of intent despite defendant's promise not to argue it). Hadley cannot preclude the government from proving intent simply by focusing his defense on other elements of his crime. Hadley's choice of defense did not relieve the government of its burden of proof and should not prevent the government from meeting this burden by an otherwise acceptable means. Rule 404(b) permits the government to prove intent by evidence of prior bad acts, and we have already held that admission of such a proof in this case was not an abuse of discretion under the rule.

[6] We must also investigate, however, whether the prior bad acts should have been excluded because their probative value was substantially outweighed by the danger of unfair prejudice. Fed.R.Evid. 403; *Ross*, 886 F.2d at 267; *Spillone*, 879 F.2d at 520. The evidence was highly probative on the question of intent, especially in light of the similarity found between the prior acts and the offense charged. The evidence was obviously prejudicial, but its prejudicial effect was limited by the instruction given by the district court. *United States v. Boise*, 916 F.2d 497, 502 n. 13 (9th Cir.1990) (as amended); *Spillone*, 879 F.2d at 520. The court properly instructed the jurors that they could use the prior bad acts evidence to establish intent and motive only if they first found that the other evidence established beyond a reasonable doubt that Hadley committed the acts charged. The possibility of unfair prejudice did not substantially outweigh the probative value of the evidence.

Thus, we conclude that the district court did not abuse its discretion in admitting the evidence of Hadley's prior acts of sexual abuse.

III

Hadley next contends that the district court improperly admitted the expert testimony of Dr. Rosenzweig, a child psychiatrist who testified for the government. We review the district court's decision to admit expert psychiatric testimony for abuse of discretion. *United States v. Binder*, 769 F.2d 595, 601 (9th Cir.1985).

[7] Hadley first argues that the expert testimony should have been excluded because it improperly bolstered the testimony of the minor victims. In support of this argument, he cites our decision in *Binder*, where we held that the district court erroneously admitted expert testimony that addressed the credibility of the abused children. In that case, however, "the experts testified that [those] particular children in [that] particular case *could be believed*." *Id.* at 602 (emphasis added). Dr. Rosenzweig, on the other hand, testified about general behavior characteristics that may be exhibited in children who have been sexually abused, and the testimony was therefore limited "to a discussion of a class of victims generally." *Id.* Because this general testimony merely "assist[ed] the trier of fact in understanding the evi-

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dence," *id.*, Dr. Rosenzweig did not improperly bolster the children's testimony.

[8] Hadley next contends that Dr. Rosenzweig's testimony failed to qualify under the test adopted in *Frye v. United States*, 293 F. 1013 (D.C.Cir.1923), and thus should not have been admitted. The *Frye* test allows admission of "[e]vidence based on a novel scientific technique" only if the technique is generally accepted as reliable in the relevant scientific community. *United States v. Solomon*, 753 F.2d 1522, 1526 (9th Cir.1985) (*Solomon*). We have held, for example, that an expert's conclusions on sexual abuse based on a child's behavior with anatomically correct dolls must pass the *Frye* test. *See United States v. Gillespie*, 852 F.2d 475, 480–81 (9th Cir.1988). The district court found that Dr. Rosenzweig's testimony was not based on any "novel scientific technique," *Solomon*, 753 F.2d at 1526, and thus need not qualify under *Frye*. Because Dr. Rosenzweig merely testified to general behavioral characteristics based upon his professional experience, and did not employ any special techniques or models, the district court correctly concluded that the *Frye* test was not applicable.

[9] Finally, Hadley argues that Dr. Rosenzweig's testimony was more prejudicial than probative, and therefore violated Fed. R.Evid. 403. The testimony helped to explain the testimony of the abused children, and therefore rendered "'appreciable help'" to the jury. *Solomon*, 753 F.2d at 1525, *quoting United States v. Awkard*, 597 F.2d 667, 669 (9th Cir.), *cert. denied*, 444 U.S. 885, 969, 100 S.Ct. 179, 460, 62 L.Ed.2d 116, 383 (1979). Hadley points to no specific prejudicial effect that substantially outweighs this probative value, and therefore, discretion was not abused in the admission of the expert testimony.

IV

We next review Hadley's contention that there was insufficient evidence to convict him of count eight, attempted aggravated sexual abuse of Roy. In reviewing a claim of insufficient evidence, we must determine whether, viewing the evidence in the light most favorable to the government, "any rational trier of fact could have found the defendant[ ] guilty beyond a reasonable doubt." *United States v. Murray*, 751 F.2d 1528, 1534 (9th Cir.), *cert. denied*, 474 U.S. 979, 106 S.Ct. 381, 88 L.Ed.2d 335 (1985).

The facts relating to count eight indicate that in November 1987, Hadley gave Roy a ride home from a swimming pool and persuaded Roy to sit on his lap and drive the vehicle. Upon feeling Hadley's penis grow erect beneath him, Roy got off his lap and returned to the passenger seat. Only one month earlier, Hadley had used the same modus operandi to penetrate Roy's anal cavity, which led to his conviction on count seven for aggravated sexual abuse.

[10] We have held that "attempt includes an element of specific intent even if the crime attempted does not." *United States v. Sneezer*, 900 F.2d 177, 179 (9th Cir.1990). Thus, to justify a conviction on count eight, the government must have proven beyond a reasonable doubt that Hadley intended to engage in a prohibited sexual act with Roy in November 1987. *See* 18 U.S.C. § 2245(2)–(3) (defining "sexual act" and "sexual contact"). In addition, to constitute an attempt, there must be more than mere preparation to commit a crime. "There must be 'some appreciable fragment of the crime' in progress." *United States v. Runco*, 873 F.2d 1230, 1232 (9th Cir.1989) (*Runco*), *quoting United States v. Buffington*, 815 F.2d 1292, 1302 (9th Cir.1987).

[11] The government introduced evidence that: (1) Hadley asked Roy to sit on his lap while Hadley was driving; (2) Hadley tried to get Roy to remove his pants; and (3) Roy felt Hadley getting an erection while Roy was sitting on Hadley's lap. In light of this evidence, together with the similar sexual abuse that occurred a month before, a rational jury could have found beyond a reasonable doubt that Hadley intended to engage in a sexual act with Roy. Furthermore, a rational jury could have concluded that Hadley's actions constituted sufficient steps "in the course of conduct planned to culminate in the commission of the crime." *Runco*, 873 F.2d at 1232. Thus, there was sufficient evidence to support Hadley's conviction on count eight.

V

[12] Finally, Hadley contends that the district court erred by imposing a sentence not in accordance with the Sentencing Guidelines for his conviction on count seven. The district court did not apply the Sentencing Guidelines in imposing a 30-year sentence on that conviction. The court did follow the Sentencing Guidelines when it sentenced Hadley to nine years in prison on counts eight and nine.

Hadley's contention is without merit. We have held that the Sentencing Guidelines do not apply to conduct that occurred before November 1, 1987. *United States v. Gray*, 876 F.2d 1411, 1418 (9th Cir.1989), *cert. denied*, — U.S. —, 110 S.Ct. 2168, 109 L.Ed.2d 497 (1990). There is no dispute that the conduct underlying the count seven conviction occurred in October 1987, prior to the effective date of the Sentencing Guidelines. Thus, the district court did not err when it declined to apply the guidelines to count seven.

AFFIRMED.

STATE OF NEVADA, Plaintiff-Appellant,

v.

Robert F. BURFORD, Director of Bureau of Land Management, Department of Interior; Edward F. Spang, Nevada State Director, Bureau of Land Management, Department of Interior, Defendants-Appellees.

No. 89-15272.

United States Court of Appeals, Ninth Circuit.

Argued and Submitted Aug. 16, 1990.

Decided Nov. 14, 1990.

State of Nevada brought action challenging Bureau of Land Management's grant of right-of-way to Department of Energy to conduct site characterization study of proposed nuclear waste repository. The United States District Court for the District of Nevada, Philip M. Pro, J., dismissed action, 708 F.Supp. 289, and State appealed. The Court of Appeals, Wallace, Circuit Judge, held that Nevada failed to show that it would suffer concrete and immediate injury as result of grant of right-of-way, and did not have standing to challenge grant.

Affirmed.

1. Federal Courts ⇐557

Where district court has inadvertently neglected to dismiss action but it is clear it intended its order to terminate action, Court of Appeals treats action as dismissed.

2. Federal Courts ⇐555

Order which dismissed complaint but which did not dismiss underlying action was appealable, where it was clear that ruling by district court was meant to be dispositive of action. 28 U.S.C.A. §§ 1291, 1331.

3. Federal Civil Procedure ⇐103.1
Federal Courts ⇐12

"Case or controversy" limitation in article III of the Constitution requires that federal courts visit threshold question of standing in every federal case; in order to clear this jurisdictional hurdle, complaining party must demonstrate injury in fact. U.S.C.A. Const. Art. 3, § 1 et seq.

4. Health and Environment ⇐25.15(4)

State of Nevada failed to show that it would suffer concrete and immediate injury as result of Bureau of Land Management's grant of right-of-way to Department of Energy to conduct site characterization study of proposed nuclear waste repository, and did not have standing to challenge grant; land was owned by federal government, and State did not allege that it used site for

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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, -vs- VERL HADLEY, Defendant-Appellant.	No. 89-10428 D.C. No. CR-88-0127-EHC ORDER DENYING REHEARING

Appeal from the United States District Court
for the District of Arizona

Before: WALLACE, Chief Judge, ALARCON and WIGGINS, Circuit Judges.

The panel as constituted above has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc. An active judge called for an en banc vote, and a majority of the judges of the court has voted to reject the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied, and the suggestion for rehearing en banc is rejected.

SEP 11

RULE 403. **EXCLUSION OF RELEVANT EVIDENCE ON GROUNDS OF PREJUDICE, CONFUSION, OR WASTE OF TIME**

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

RULE 404. **CHARACTER EVIDENCE NOT ADMISSIBLE TO PROVE CONDUCT; EXCEPTIONS; OTHER CRIMES**

(a) **Character evidence generally.** Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except:

(1) **Character of accused.** Evidence of a pertinent trait of character offered by an accused, or by the prosecution to rebut the same;

(2) **Character of victim.** Evidence of a pertinent trait of character of the victim of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the victim offered by the prosecution in a homicide case to rebut evidence that the victim was the first aggressor;

(3) **Character of witness.** Evidence of the character of a witness, as provided in rules 607, 608, and 609.

(b) **Other crimes, wrongs, or acts.** Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

(As amended Mar. 2, 1987, eff. Oct. 1, 1987.)

No.

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1991

VERL HADLEY

Petitioner,

v.

UNITED STATES OF AMERICA

Respondent.

MOTION FOR APPOINTMENT

OF COUNSEL

Verl Hadley was represented by the undersigned counsel appointed pursuant to Title 18 U.S.C. §3006A(d)(6) in the Court of Appeals for the Ninth Circuit and by appointed counsel before the district court. Mr. Hadley, by and through counsel, has applied to proceed before this court in forma pauperis. Mr. Hadley, through counsel, also requests that the undersigned counsel be appointed to represent him in all proceedings before this Court and, in addition, requests an order appointing counsel nunc pro tunc for purposes of preparing and submitting the Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted,

Dated: December 5, 1991

John [illegible]
601 N. Humphreys
Flagstaff, AZ 86001
(602)774-2773
Attorney for Petitioner

No.

IN THE
SUPREME COURT OF THE UNITED STATES
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UNITED STATES OF AMERICA

Respondent.

MOTION FOR LEAVE TO

PROCEED

IN FORMA PAUPERIS

Pursuant to Title 18 U.S.C. §3006A(d)(6) and Rule 39 of this Court, Petitioner, Verl Hadley, requests leave to file the enclosed Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit without prepayment of fees or costs and to proceed in forma pauperis. Petitioner was represented by counsel appointed pursuant to Title 18 U.S.C. §3006A(d)(6) in the district court and on appeal to the Court of Appeals for the Ninth Circuit.

Respectfully submitted,

Dated: December 5, 1991

John Trebon
601 N. Humphreys
Flagstaff, AZ 86001
(602)774-2773

Attorney for Petitioner

No.

IN THE
SUPREME COURT OF THE UNITED STATES
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VERL HADLEY

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Respondent.

PROOF OF SERVICE

STATE OF ARIZONA)
) ss
County of Coconino)

John Trebon, being first duly sworn, deposes and states that he is a member of the Bar of the Supreme Court of the United States; that on December 5, 1991, the petition for writ of certiorari in the above entitled case was deposited in a United States post office mail box located in Flagstaff, Arizona, with priority postage prepaid, properly addressed to the Clerk of the Supreme Court of the United States, within the time allowed for filing said petition for writ of certiorari, with additional copies of the petition and affidavit of mailing to counsel for respondent and the Solicitor General, Department of Justice:

United States Attorney
230 N. 1st Ave., 4th Flr.
Phoenix, Arizona

Solicitor General
Department of Justice
Washington, D.C. 20530

Dated this 6th day of December, 1991, in Flagstaff, Arizona.

John Trebon, Affiant

SUBSCRIBED & SWORN to before me this 6 day of December, 1991, by John Trebon.

Sue Eaton
Notary Public

My Commission Expires:

MY COMMISSION EXPIRES JUNE 5, 1992